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CONTROLLING EXECUTIVE POWER IN THE WAR ON TERRORISM

Mark Tushnet*

Imagine this scenario: after a series of bombings in New York, the President directs U.S. armed forces to round up Arab American males over the age of fifteen in the New York metropolitan area and confine them in a sports stadium; those who military officers determine pose no continuing threat to domestic security are released back to their communities, a process that predictably will lead to some detentions lasting a month and more.¹ The discussion by Professors Bradley and Goldsmith of the Authorization for the Use of Military Force² (AUMF) adopted on September 18, 2001,³ raises the intriguing question: would such action be authorized by the AUMF already in place?⁴ This Reply addresses only a few aspects of the problems Professors Bradley and Goldsmith consider, in an attempt to draw out some of the more general implications of their analysis for constitutional law.

How does — or should — the U.S. Constitution regulate the exercise of power in response to threats to national security, to ensure that power is used wisely?⁵ Broadly speaking, two mechanisms of control are available: a separation-of-powers mechanism and a judicial-review mechanism.⁶ Both mechanisms aim to ensure that the national government exercises its power responsibly — with sufficient vigor to meet the nation's challenges, but without intruding on protected liber-

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¹ The hypothetical is suggested by the plot of the movie *The Siege*, the position taken by the Bush Administration with respect to those detained as enemy combatants, and *Ex parte Endo*, 323 U.S. 283 (1944).

² Pub. L. No. 107-40, 115 Stat. 224 (2001).

³ Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005).

⁴ I will not discuss in this Reply two additional questions, which Professors Bradley and Goldsmith note but (properly, given their focus) do not discuss in detail: (1) whether the President would have — or already has — the power under the Constitution even without congressional authorization to order the detention of American citizens under the facts I have imagined, and (2) whether such detentions, whether authorized by Congress or by “pure” Article II powers of the presidency, whatever they might be, violate the Constitution’s rights-protecting provisions, including the equality component of the Fifth Amendment.

⁵ For reasons that will appear, the distinction between *does* and *should* is important to my argument. See *infra* pp. 2680–81.

⁶ These mechanisms, I emphasize, are designed to *regulate* the exercise of power so that it is used wisely — forcefully enough to meet threats to national security but delicately enough to preserve liberty within the United States — and *not* (merely) to limit the exercise of power.

ties.⁷ Under the separation-of-powers mechanism, nearly all of the work of regulating power is done by the principle that the President can do only what Congress authorizes.⁸ Its primary concern is what Professors Bradley and Goldsmith call Executive Branch unilateralism, a fear that Presidents acting on their own might make unsound decisions, engaging in too much (or too little) military action, intruding on liberties too much (or too little). Under the judicial-review mechanism, courts enforce two sets of principles: principles allocating power between the President and Congress, and principles protecting individual liberties, such as those embodied in the Fourth and Fifth Amendments. Its primary concern is that the government as a whole will act improvidently. To avoid unilateral executive (or congressional) action, the judicial-review mechanism makes the concerns that underlie the separation-of-powers mechanism enforceable by the courts. I believe that neither the separation-of-powers nor the judicial-review mechanism of control is adequate to the task of structuring the exercise of national power under modern conditions, and that we would benefit from creative thinking about good constitutional design.

Defenders of the separation-of-powers mechanism make both a positive and a negative case.⁹ The positive case rests on the classic "ambition counteracting ambition" theory articulated in *The Federalist Papers*.¹⁰ Congress and the President stand in structural opposition to each other, with each side alert to possible "power grabs" by the other that would threaten — simultaneously — the people's liberties and the prerogatives and power of the opposing branch.¹¹ In addition, the people influence the President and Congress differently, with members of the House of Representatives concerned that their constituents might turn them out of office if they fail to challenge presidential initiatives that the people believe threaten their liberties, the President

⁷ The scope of those liberties might of course depend on the degree to which it is necessary to exercise power vigorously. For a discussion of this issue, see Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605 (2003).

⁸ The qualifications to this principle are that the President might have some residual power from Article II alone and that there might be some residual individual-rights protections enforceable against actions that Congress has authorized. But the operative term in these formulations is *residual*: under the separation-of-powers approach, the scope of the President's independent power is narrow, and the restrictions on what Congress can authorize are minor.

⁹ For a good presentation of the separation-of-powers view, see Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, in THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 161 (Mark Tushnet ed., 2005). The separation-of-powers mechanism operates through a number of channels, including oversight hearings, congressional investigations, and bargaining with the President over funding for his programs.

¹⁰ THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961).

¹¹ *The Federalist Papers*' observation that a government with various loci of power provides a "double security . . . to the rights of the people" is relevant here, although that observation was made in connection with federalism rather than the separation of powers. *Id.* at 320.

having a nationwide constituency more sensitive than smaller and more parochial constituencies to national security concerns, and the Senate free to deliberate about what good policy would be without concern for short-run political disadvantage.¹² The separation-of-powers mechanism rejects executive unilateralism, but identifies no enduring substantive limitations on what the President and Congress may do; the only limitations are those worked out in the interactions between the President and Congress.¹³

Professors Bradley and Goldsmith indirectly challenge the adequacy of the separation-of-powers mechanism of control by showing how the AUMF can be given an entirely reasonable interpretation that some might think authorizes actions within the borders of the United States that pose threats to basic liberties of American citizens.¹⁴ Such actions may seem permissible because the only operative limitation on authorized actions appears to be that they be taken against persons with, as Professors Bradley and Goldsmith put it, some nexus to al Qaeda, the Taliban, and the September 11 attacks. Indeed, on Professors Bradley and Goldsmith's interpretation, which I emphasize is a reasonable one, that nexus need not have existed *on* September 11. Clearly, a person who — after the event — knowingly harbored an individual who planned the September 11 attacks would have the requisite nexus.¹⁵ Nor would it be unreasonable to conclude that a person who, as the jargon now goes, provides material support (today) to those who planned the attacks (several years ago) has the required nexus. That support, I would think, would obstruct the implementation of the AUMF's directive "to prevent any future acts of international terrorism" by those who planned the September 11 attacks.¹⁶

¹² The positive case could be bolstered by a suspicion of judicial-review mechanisms generally, on the ground that self-governance requires that reasonable interpretations of constitutional values as embodied in legislation enacted by representative institutions prevail over reasonable interpretations of such values as articulated in decisions by less representative institutions. This argument may play some role in supporting the principles of deference to executive interpretation that Professors Bradley and Goldsmith identify.

¹³ The courts' role in the separation-of-powers mechanism is confined to the (not insignificant) task of interpreting statutes to determine what Congress has tried to do. With such interpretations in hand, the President and Congress return to their power struggles.

¹⁴ I refer to the threats to citizens so as to avoid controversy over what constitutional restrictions apply to exercises of power that adversely affect noncitizens, including those lawfully residing in the United States. For an extensive discussion of such restrictions, see DAVID COLE, *ENEMY ALIENS* (2003).

¹⁵ In the AUMF's terms, such a person will have "aided the terrorist attacks" by insulating those who planned the attacks from retaliation or capture that would "prevent any future acts of international terrorism" by the planners. See Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

¹⁶ *Id.*; see also Bradley & Goldsmith, *supra* note 3, at 2082, 2083 n.146 (noting the argument that the AUMF gives the President the authority to "identify the covered enemy" generically, though perhaps not person by person).

Professors Bradley and Goldsmith do provide some additional guidelines for interpreting the AUMF. They argue, for example, that the AUMF should be interpreted to authorize actions taken against "direct participants" in activities with the requisite nexus, which, they suggest, addresses reasonably well concerns expressed by some that the AUMF authorizes large-scale "sweeps" of those said by administration officials to be supporters of terrorism.¹⁷ I am not as sure as they that this interpretation alleviates all reasonable concerns. The reason is that Professors Bradley and Goldsmith note that reasonable Executive Branch interpretations of international law may be entitled to judicial deference.¹⁸ They observe that the contours of the category "direct participation" are not well defined in international law.¹⁹ It would seem, then, that were a President to interpret "direct participation" expansively — for example, to include those who unintentionally provide material support to actors with the required nexus — *that* interpretation should be given deference, unless it is "unreasonable," a concept the contours of which Professors Bradley and Goldsmith do not define.

As Professors Bradley and Goldsmith suggest, the possibility of invoking clear statement principles animated by concerns about individual liberty is perhaps more promising.²⁰ But once again, they offer an interpretive principle that reduces the impact of clear statement principles on interpretation of the scope of the AUMF. Drawing on *Ex parte Endo*²¹ and *Duncan v. Kahanamoku*,²² Professors Bradley and Goldsmith suggest that liberty-protecting clear statement principles should be invoked when — but seemingly only when — the practices at issue involve "presidential actions . . . unsupported by historical practice in other wars, and implicate[] the constitutional rights of U.S. citizen *non-combatants*."²³ Suppose we shift the emphasis in that formulation to the phrase *unsupported by historical practice*. Large-scale detentions of U.S. citizen noncombatants do have historical support, of course — in the detention of American citizens of Japanese descent during World War II.²⁴ So, at least to this point, the legal analysis

¹⁷ See Bradley & Goldsmith, *supra* note 3, at 2116.

¹⁸ *Id.* at 2084 n.150 ("The justifications for . . . deference . . . are probably even stronger with respect to customary international law, an amorphous and evolving body of law, the content of which has always been informed by political discretion and national self-interest.").

¹⁹ *Id.* at 2115–16.

²⁰ *Id.* at 2104 ("A clear statement requirement to protect individual liberties is potentially more relevant [than one based on delegation concerns].").

²¹ 323 U.S. 283 (1944).

²² 327 U.S. 304 (1946).

²³ Bradley & Goldsmith, *supra* note 3, at 2105. I simply note that this formulation would not require the invocation of a liberty-protecting clear statement rule as to non-U.S. citizen noncombatants, including long-term lawfully resident alien noncombatants.

²⁴ That those detentions have been discredited in some contexts does not, I think, count against their being the kind of historical practice relevant to the limits on the clear statement prin-

would not justify the invocation of a liberty-protecting clear statement rule in the situation I described at the start of this Reply.²⁵

I should emphasize here that I am not arguing that the interpretation of the AUMF I have outlined follows inexorably from the principles that Professors Bradley and Goldsmith identify.²⁶ Rather, my argument is that the interpretation is within the bounds of reasonable legal argument predicated on the separation-of-powers mechanism for regulating government actions in response to threats to national security. I may be wrong about some of the specific implications of their analysis, but I believe that on any view Professors Bradley and Goldsmith have shown that quite expansive interpretations of the AUMF are reasonably available.

That conclusion raises questions about the adequacy of the separation-of-powers mechanism itself. Consider first how reasonable legal arguments function in that mechanism's operation. We are dealing with an area in which the President has a significant first-mover advantage. That is, the President has the power to act without seeking additional approval from Congress once it has authorized the use of force.²⁷ After the President has acted, the burden lies on other institutions to force him to alter his policies. But the fact that a reasonable, if expansive, interpretation of the AUMF supports the President's policies (even if there are also reasonable grounds on which to challenge them) makes the task of the other institutions more difficult. Congress would have to persuade enough of its (and the President's) constituents that the President's legal arguments were insufficient to justify his action, even though, by hypothesis, they were not unreasonable. We can expect doing so to be quite difficult.²⁸

ple's invocation, particularly because we may be observing a process of rehabilitating the World War II detentions — a process that might include presidential interpretations to which, again, deference would be appropriate.

²⁵ Professors Bradley and Goldsmith argue that the treatment of 18 U.S.C. § 4001(a) by the plurality in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), could be read as "rejecting a clear statement requirement in th[e] context [of the detention of enemy combatants], or as accepting only a weak version of such a requirement that could be satisfied by background interpretive factors rather than specific text." Bradley & Goldsmith, *supra* note 3, at 2106. On either view of the holding, the AUMF might reasonably be interpreted to authorize large-scale detentions of U.S. citizens. On the former view, the weak requirement would be satisfied by the historical practice of such detentions, and on the latter, the statute would not impose any clear statement requirement because the triggering feature — lack of support in historic practice — is absent.

²⁶ Nor, and I hope obviously, do I believe that they accept the interpretation I have outlined.

²⁷ At least he may do so if, as in the AUMF, the approval does not impose conditions on additional actions. I discuss below why contemporary authorizations might infrequently contain such conditions. See *infra* pp. 2678–79.

²⁸ Exercising their limited role of interpreting statutes, the courts would have to muster arguments showing that the President's legal arguments are weaker than the alternatives, a job made even more difficult by the fact that this is an area where one interpretive principle is deference to presidential judgment.

The first-mover advantage is supplemented by the so-called "rally round the flag" effect: a President's military initiatives result in a short-term boost in his popular approval, at least when the initiatives appear to have relatively small immediate costs.²⁹ The effect may dissipate over time, but the authorizations that Presidents obtain ordinarily come early, when the effect persists. And indeed, the authorization itself is apt to be adopted by Congress as a means by which its members can themselves rally round the flag.

The advantages conferred by the President's first-mover position and the rally round the flag effect enable Presidents to obtain quite generous authorizations from Congress, which they can then use as springboards for a wide range of actions. But contemporary Presidents also have a structural advantage arising from the modern political party system. The separation-of-powers mechanism weakened with the advent of political parties that linked national officials, especially the President, to the local political coalitions that selected candidates for Congress. The joint membership of a President and members of Congress in a single political party reduced the incentives on each side to oppose the other: the conflict envisioned in the separation-of-powers mechanism would impair the political party's ability to accomplish goals shared within the party. But parties alone need not make the separation-of-powers mechanism entirely feeble. For much of the nation's history, the so-called "national" political parties have been coalitions of local party organizations, which often held quite different views on important questions of public policy.³⁰ Differences *within* the major political parties thus kept the separation-of-powers mechanism alive, as a President's opponents within his own party could join with those in the other party to constrain him.

Two modern developments transformed the party system.³¹ First, over the course of the twentieth century, political parties became nationalized under presidential leadership. Especially after the New Deal, Presidents had at least as much patronage to dispense as local party leaders did, and were able to use national programs to gain con-

²⁹ See BRUCE RUSSETT, *CONTROLLING THE SWORD: THE DEMOCRATIC GOVERNANCE OF NATIONAL SECURITY* 34 (1990).

³⁰ Consider, for example, the ideological differences between northern urban Democrats and southern white Democrats in the New Deal period, when the former were strong supporters and the latter were at best reluctant supporters — and often strong opponents — of President Franklin Roosevelt's initiatives. Consider as well the differences between the internationalist wing of the Republican Party in the 1950s, represented by Dwight Eisenhower and John Foster Dulles, and the party's isolationist wing, represented by Senator Robert Taft.

³¹ I describe these developments, which are the subject of a large literature in political science, in the broadest possible terms, knowing that any detailed account would have nuances and qualifications. For one important contribution to the literature, which has influenced my thinking a great deal, see STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* (1993).

trol over local parties and whip them into supporting presidential agendas. Second, the national political parties became increasingly ideologically coherent: conservatives in the South migrated from the Democratic to the Republican Party, and Rockefeller Republicans in the Northeast became independents or Democrats.³² Ideological divisions within the parties have nearly disappeared.

When government is unified, in the sense that the President and Congress are in the hands of the same party, and that party is itself more unified than ever, Congress will probably authorize anything for which the President asks. When government is divided, with at least one house of Congress not controlled by the President's party, the story is more complicated, but broad authorizations still seem likely because of the President's first-mover advantage and the rally round the flag effect.³³ The result is functionally executive unilateralism within the form of a separation-of-powers system. If practical concerns animate nervousness about executive unilateralism, its achievement through the operation of modern politics should be as troubling as would be its defense as a matter of constitutional interpretation.

So far I have argued that the positive case for the separation-of-powers mechanism is worryingly frail under modern circumstances. Ordinarily, the natural next move would be to say that, *faute de mieux*, we should adopt the judicial-review mechanism. Doing so, however, would ignore the negative case for the separation-of-powers mechanism. The negative case is that judges have proven extremely deferential to actions taken by the political branches, and their deference to the political branches in national security matters is entirely predictable. Judges rarely have the background or the information that would allow them to make sensible judgments about whether some particular response to a threat to national security imposes unjustifiable restrictions on individual liberty or is an unwise allocation of decisionmaking power.³⁴ Thus, the difference between the residual role given individual rights in the separation-of-powers mechanism and its seemingly prominent role in the judicial-review mechanism

³² For a vivid demonstration of the ideological polarization of the parties in Congress, see Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459, 479–83 (2004).

³³ The President's ability to receive broad grants of power even during periods of divided government seems especially likely if the President's party has a substantial minority presence in the House of Representatives or the Senate.

³⁴ As the Supreme Court once put this concern, the President "has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). The reference here is to the President's special resources in the field of national security relative to those of Congress, but the underlying concern obviously can be generalized to encompass the differential resources available to the political branches as compared to the courts.

nearly disappears. Indeed, a principle of deference to the political branches in a context in which the President has a first-mover advantage often amounts in practice to deference to the President — executive unilateralism in a new guise.³⁵ Further, if courts purport to police the policymaking process but actually supervise it with an extremely loose hand, the negative case asserts that the judicial-review mechanism might *worsen* the political branches' performance because their members might mistakenly believe that the courts will bail the people out of whatever trouble the political branches make.

I believe that this negative case is substantial. Yet, if we cannot rely on the courts to do a good job of ensuring that the government acts responsibly, and the separation-of-powers mechanism is similarly unreliable, what can we do?

At this point, I think, we should step back and examine the framework within which the entire discussion occurs. The discussion takes as its organizing question, "Given the Constitution we have, what are the best ways to structure a government that has adequate power to deal with national security threats and yet is constrained by considerations of individual liberty in exercising that power?" Neither the separation-of-powers mechanism nor the judicial-review mechanism seems an effective way to structure government. I suppose we could await the development or invention of a third mechanism within the existing Constitution. Alternatively, we might ask why we take the existing Constitution as a given.³⁶ One coming afresh to the challenge of designing institutions to deal with modern national security threats would not, I think, naturally take the institutions created in 1789 as the starting place. Those institutions were designed with different kinds of threats to national security in mind.³⁷ And, although the general and abstract terms used in the 1789 Constitution are indeed commodious and adaptable to new circumstances, they might not be commodious enough. Or at least, conducting the discussion of institutional design within the terms set by the 1789 Constitution can distract us from developing appropriate institutional responses to modern conditions.

³⁵ Justice Powell's position in *Goldwater v. Carter*, 444 U.S. 996 (1979), provides a nice example. In a case challenging the constitutionality of the President's abrogation of a treaty without securing the Senate's advice and consent, Justice Powell refused to exercise judicial review because the Senate as a corporate body had not expressed its position on the constitutional question. *See id.* at 997–98 (Powell, J., concurring in the judgment). The President's first-mover advantage thus placed a difficult-to-overcome burden on the Senate.

³⁶ For an exploration of this question from a different angle, see Mark Tushnet, "Our Perfect Constitution" *Revisited*, in *TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION: DEBATING THE ENEMY COMBATANT CASES* (Peter Berkowitz ed., forthcoming 2005).

³⁷ For a demonstration, see PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 144–204 (2002).

I confess that I am not particularly creative in imagining alternative institutional designs that would ensure that power be exercised wisely under modern circumstances. Simply to illustrate what I have in mind, though, suppose we engaged in a detailed policy analysis and concluded that it would be helpful to have a new institution to supervise modern exercises of military power, an institution that drew on the different forms of expertise now lodged in Congress, the Executive, and the judiciary. Perhaps we would want to design an institution in which a group of judges, legislators, military officers, and civilians elected by the nation as a whole promulgated legally binding rules for the conduct of military engagements — without the intervention of Congress or the President — and could sometimes issue immediately binding orders to U.S. citizens, enforceable by contempt sanctions imposed by the new institution itself. The constitutional problems associated with such an institution jump off the page: the Incompatibility Clause, Article III, the nondelegation doctrine, and much more. These constitutional problems, of course, would be largely independent of any normative policy arguments regarding such a proposal.

Perhaps we could be persuaded that this new institution's design did indeed conform to the constraints on institutional innovation imposed by the existing Constitution. I am sure, though, that the discussion of the proposal's soundness as a matter of policy would be polluted by discussions of whether the proposal, if enacted, would be constitutional.³⁸ Those in favor of such an institution on policy grounds might find themselves arguing — perhaps somewhat disingenuously — that the innovation is indeed compatible with the Constitution. We could avoid such distractions if the proposal were cast as a constitutional amendment.³⁹ The amendment process is a difficult

³⁸ For an example of the phenomenon I have in mind, consider the reaction to Bruce Ackerman's proposal for a framework statute governing the exercise of power during emergencies. See Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004). The critical discussion of his proposal included questions about whether the framework statute was consistent with the existing Constitution. See, e.g., Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1805 (2004) ("Do we think Ackerman's proposal is unconstitutional within the terms of ordinary constitutional law? In an important sense, the question answers itself. Of course we do . . ."). I should note that Professor Ackerman would not require that the textual Constitution be formally amended for his proposal to be constitutional in the end, even if he believed it to be currently unconstitutional, because he has an account of constitutional amendment outside the procedures provided for in Article V. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 383 (1998).

³⁹ I note two additional, but quite modest, advantages of thinking about institutional design questions as implicating the need to amend the Constitution. First, the President has no formal role in the amendment process. See *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 382 (1798) (holding that constitutional amendments need not be submitted to the President for signature before transmittal to the states for ratification). Formally, then, the process will not be affected by the President's first-mover advantage, although as a practical matter the President would have a large role in any amendment process dealing with national security. Second, thinking about insti-

one, of course, and the problems we face may seem so pressing that they need to be addressed immediately, such as through litigation under the existing Constitution. As I have observed elsewhere, however, at the time of this writing José Padilla remains incarcerated, uncharged and with only a single trial judge having evaluated the grounds for his detention, nearly three years after he was taken into custody.⁴⁰ It is not obvious to me that the problems posed by Padilla's detention would have been solved less promptly had we begun to consider constitutional amendments to deal with his circumstances — and, more generally, with the design of institutions to ensure the responsible exercise of power in the war on terrorism — as soon as he was detained. Waiting for the existing Constitution to solve the problems thrust on the nation, that is, may take more time than amending the Constitution.⁴¹

Unfortunately, I have neither the creativity nor the space in this short Reply to suggest an institutional mechanism that might do a better job than the separation-of-powers or judicial-review mechanisms in organizing the modern response to national security threats. As is often the case, though, we might do well to take Abraham Lincoln as our guide. In his second annual message to Congress, Lincoln said:

The dogmas of the quiet past, are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion.

As our case is new, so we must think anew, and act anew. We must disenthrall our selves, and then we shall save our country.⁴²

Perhaps we should consider the possibility that the existing Constitution is one of the dogmas of the quiet past.

tutional design by means of constitutional amendment would license examination of institutional designs in other constitutional systems without triggering concern that comparative constitutional experience is irrelevant to the problems at hand. Cf. *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (observing that the “comparative [constitutional] analysis . . . [is] of course quite relevant to the task of writing [a constitution]”).

⁴⁰ Tushnet, *supra* note 36, at 32.

⁴¹ Of course, the political conditions that affect assessment of the President's *actions* would also affect the amendment process. In that process, though, the politics would affect consideration of a proposal rather than of an action already taken, and it seems to me that the politics surrounding proposals differ from those surrounding completed actions. It seems appropriate to note as well that my advocacy of a constitutional amendment process is designed as much to get our thinking unstuck as to propose a practical political program.

⁴² Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862), in 5 COLLECTED WORKS OF ABRAHAM LINCOLN 518, 537 (Roy P. Basler ed., 1953). Lincoln of course believed that much, perhaps all, of what he did was consistent with the existing Constitution, but he was not averse to acting in a manner that some, at least, thought was inconsistent with the Constitution, and with respect to some of his actions he did not regard the charge of acting unconstitutionally as seriously impugning his leadership.